

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT JAMES VAN ELLS,

Plaintiff/Counter-Defendant-
Appellee,

v

TAMI LYNN VAN ELLS,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

July 3, 2008

No. 270810

Eaton Circuit Court

LC No. 05-001214-DO

Before: Kelly, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. On appeal, defendant challenges the trial court's award of spousal support and its denial of her request for attorney fees. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not address plaintiff's requests for special appellate relief because he did not raise his issues in the trial court and has not filed a cross appeal. See *McCardel v Smolen*, 404 Mich 89, 94-95; 273 NW2d 3 (1978).

On appeal, defendant challenges the trial court's award of \$1,000 a month for five years in rehabilitative spousal support. We review a trial court's award of spousal support for abuse of discretion, *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003), but the trial court's factual findings are reviewed for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

In determining whether an award of spousal support is appropriate, the following factors should be considered:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the health of the parties, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, and (12) general principles of equity. [*Gates, supra* at 436.]

Defendant challenges the trial court's factual findings with respect to factors (1) and (8), and its ultimate award.

With regard to the parties' past relations and conduct, the trial court found that although both parties demonstrated negative behavior, this factor favored plaintiff. On appeal, defendant challenges nearly every statement the trial court made regarding this factor. Because no testimony was taken, however, the trial court had to rely on the parties' arguments and supportive documents to determine the credibility and reliability of the conflicting evidence. It found that defendant's allegations were not as credible as plaintiff's in light of the supporting evidence. The trial court gave significant weight to the affidavit of defendant's brother, Thomas Hands, who stated that defendant had always been a mean and manipulative person. Defendant contends that the trial court clearly erred by giving Hands's statements undue weight because it was undisputed that she and Hands had a falling out in 1987 and had not spoken since. Although bias was certainly an aspect for the trial court to consider, the trial court did not clearly err in according weight to the negative sentiments of Hands and others who had personal experience dealing with defendant.

The trial court also based its determination of this factor on its finding that many of defendant's claims were unsupported or exaggerated. Again, we find no clear error. Defendant accused plaintiff of having an affair with a woman, which he denied. Defendant attempted to support this claim by submitting telephone records, bank statements, and a birthday card signed, "Love, Bob" that accompanied flowers sent to the woman. The bank statements show no explicit pattern suggestive of infidelity, especially considering that plaintiff provided evidence that many of the transactions recorded in the summer of 2004 were erroneously attributed to a restaurant. Although the telephone calls and card demonstrate a pattern of communication shortly before plaintiff and defendant separated, the record does not indicate that the trial court clearly erred in discounting defendant's claim of adultery. Defendant also baldly asserted that plaintiff admitted that he had engaged in an emotional affair with a neighbor. Plaintiff denied this and submitted an affidavit from the neighbor who also denied any type of affair.

Defendant also argues that the trial court misconstrued her statements, implying that she had claimed that plaintiff did not help much with the house and children. However, defendant frequently alluded to plaintiff's domestic deficiencies by emphasizing that she did most of the housework and childcare and by stating that plaintiff worked a lot, focused on his career, and frequently hired babysitters in order to go out on evenings that defendant had to work. Plaintiff submitted affidavits from two of the parties' children who both stated that plaintiff was the person who did most of the laundry, housekeeping, and grocery shopping, and was extremely involved with the children and their activities. Under the circumstances, the trial court correctly addressed defendant's evidence, and defendant fails to demonstrate any factual or legal error in the trial court's conclusions.

Defendant also argues that plaintiff's reconciliation attempt was disingenuous, and that his sole motive was to arrange his finances before pursuing divorce, but defendant's own evidence belies this assertion. In a May 2004 letter from plaintiff to defendant, plaintiff indicated that he was glad that their communication had improved and would take defendant on a trip to rekindle the romance in their relationship. Defendant acknowledges that the parties took the trip. Defendant's evidence regarding her alarm over refinancing the marital home was

effectively rebutted by plaintiff, which supports the trial court's finding that defendant tended to exaggerate plaintiff's bad faith toward the marriage.

Defendant asserts that the trial court clearly erred in stating that she did not work outside the home after the children were of school age because she did not want to. However, there were several years after the children entered school that defendant did not work, so the trial court's statement was supported by the record and is not clearly erroneous.

The trial court's other findings regarding this factor were not particularly significant given the multitude of findings on which the trial court principally relied in deciding this factor in favor of plaintiff. Considering the trial court's findings as a whole, and the fact that most of the findings depend on the trial court's determination of credibility issues, the court did not clearly err in finding that this factor favored plaintiff.

The trial court found that factor (8) did not favor either party because both "had the normal needs of a person living on his or her own." It added that the parties' needs were met by their respective incomes. Defendant argues that this latter statement is clearly erroneous as applied to her. Even if true, the court's statement on this point was immaterial. This factor only addresses the parties' needs, not whether those needs are met by their respective incomes. The record supports the trial court's factual finding that both parties had normal needs and defendant does not assert otherwise.

However, this issue dovetails into defendant's argument that the final award was unfair and inequitable. Where the trial court's factual findings are upheld, this Court reviews the award to determine if it was fair and equitable under the circumstances. *Moore, supra* at 655. Because the trial court did not err in its factual findings, we reject defendant's assertions that the trial court abused its discretion by giving too little weight to certain factors while giving too much weight to other factors. The objective of spousal support is to "balance the incomes and needs of the parties in a way which will not impoverish either party," *id.* at 654, not necessarily to equalize the parties' incomes as defendant asserts. Above all, the award must be just and reasonable under the circumstances. *Id.* With the trial court's initial award, the evidence demonstrated that defendant would receive roughly \$35,000 in annual income for five years if defendant did not increase her income level. The trial court intended the award to be for rehabilitative purposes, so that defendant could eventually raise her earning potential. Defendant is not a stranger to the work environment, and she has failed to demonstrate how her needs will go unmet if plaintiff does not contribute more to her income. In sum, we are not persuaded that the trial court's award was an abuse of discretion.

Defendant also argues that the trial court erred in denying her request to have plaintiff pay her attorney fees. "Attorney fees in a divorce action are not recoverable as of right." *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). "Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Gates, supra* at 438 (citations omitted). As with a support order, a trial court's decision regarding an award of attorney fees is reviewed for an abuse of discretion, *id.* at 437-438, but the court's findings of fact are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005).

The trial court determined that defendant could afford to pay her own attorney fees. Defendant argues that it is not possible to pay her attorney fees, which she claims exceed \$20,000, and still meet her needs without invading her support award. The trial court did not address the reasonableness of the claimed fees or review whether the payment of the fees would require defendant to tap into her supportive assets, so the trial court's analysis evades our review. Without the trial court's spousal support award and without a change in defendant's job circumstances, defendant could anticipate an annual income of about \$23,000. This income level clearly could not lightly bear the weight of a \$20,000 burden. However, the record is unclear whether the trial court doubted the reasonableness of the fees, somehow expected defendant to pay the fees from an untapped income source or property reserve, or intended defendant to invade the support award to settle them. The existing analysis simply does not support the first two theories, and the third is legally improper. Nor did the trial court explain that it had awarded additional, non-support assets so that defendant could afford the fees; it simply held that defendant could afford them. The paucity of the analysis in the record precludes adequate review, so we remand to allow the trial court to develop the record with the factual findings and legal conclusions that support its conclusion that defendant was able to afford a reasonable attorney fee or for reconsideration of its decision.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell